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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 CABRERA,

No. C 10-03143 CRB

12 Plaintiff,

**ORDER GRANTING MOTIONS TO
DISMISS**

13 v.

14 LONG BEACH MORTGAGE ET AL,

15 Defendant.
16 _____/

17 Pro se Plaintiff Luis Cabrera has brought suit against Long Beach Mortgage and
18 others, alleging 22 causes of action in connection with a loan repayment agreement entered
19 into on April 27, 2006. Because just four of those causes of action involve federal claims,
20 and those claims are time-barred, the Court DISMISSES the Complaint; however, it does so
21 (as to all but two claims) without prejudice, provided that Plaintiff can in good faith amend to
22 show his entitlement to equitable tolling of the TILA damages and RESPA claims.

23 **I. BACKGROUND**

24 On April 27, 2006, Plaintiff entered into a “loan repayment and security agreement”
25 with Defendant Long Beach Mortgage, which required him to repay a preexisting \$664,000
26 loan, as well as a second loan of \$166,000. Cmpl. ¶ 2. The loans were negative
27 amortization loans. Id. When Plaintiff’s rate adjusted at the two year mark, he was “hit with
28 extreme ‘payment shock.’” Id.

Plaintiff asserts that all of the Defendants are liable for Defendant Long Beach's actions based on agency laws. Id. ¶ 24. Plaintiff alleges that Defendants "have been selling loan products that they knew or should have known would never be able to be repaid by the borrower." Id. ¶ 16. He alleges that the Defendants "intentionally concealed the negative implications of the loan they were offering," and that the terms of the transaction were not clear and conspicuous, as required. Id. ¶¶ 17, 19. Specifically he alleges that the negative amortization features of the loan, the fact that he was given the loan based only on his stated income and credit report, Defendants' flawed underwriting procedures, an understated finance charge, improper fees such as a "Yield Spread Premium" and other unspecified items were not disclosed or made clear to him. Id. ¶ 19.¹

Plaintiff further alleges that Defendant Long Beach subsequently sold its interest in the trust deed to Defendant Deutsche, but never perfected its interest and therefore lacks the legal right to foreclose. Id. ¶ 24. He asserts that the Trustee Sale took place on May 6, 2010. Id. ¶ 153.² And he claims that Defendants have also "threatened [him] with an unlawful detainer action." Id. ¶ 45.

Plaintiff filed suit in state court on May 27, 2010. See Cmplt. His Complaint includes causes of action for: (1) Declaratory Relief; (2) Injunctive Relief; (3) "Determine Nature, Extent and Validity of Lien"; (4) Contractual Breach of Good Faith and Fair Dealing; (5) Violation of TILA; (6) Violation of RESPA; (7) Violation of Cal. Civ. C. § 1916.7b(2); (8) Violation of Cal. Civil C. § 191801920, 1921; (9) Violation of Cal. Civil C. § 1916.7B; (10) Violation of Cal. Civil C. § 1916.7a(8); (11) Violation of Cal. Civil C. § 2079.16; (12) Violation of Cal. Civil C. § 226.23(3); (13) Rescission; (14) Fraud; (15) Unfair and Deceptive Acts and Practices; (16) Breach of Fiduciary Duty; (17) Unjust Enrichment; (18)

¹ He also states that Long Beach was paid fees, which were hidden from him; that Defendants "failed to provide Plaintiff with written notice of the furnishing of negative credit information to consumer reporting agency," and that a "California Insurance Disclosure as mandated by law was not provided to him." Id. ¶¶ 31-33.

² Defendants could not confirm this fact at the motion hearing on December 10, 2010.

Unconscionability; (19) Predatory Lending under Cal. Bus. and Prof. C. § 17200; (20) Quiet Title; (21) Wrongful Foreclosure; and (22) Slander of Title.

Defendants removed on July 19, 2010 based on the Court's federal question jurisdiction over the TILA and RESPA claims. See Not. of Removal, dckt. no. 1, ¶ 3. Now pending are two separate motions to dismiss by Defendant PMH Financial³ and by JPMorgan Chase Bank (who acquired certain assets of Washington Mutual Bank, who succeeded Long Beach Mortgage Company). See dckt. nos. 25 and 30. In his Opposition, Plaintiff alleged for the first time that "Plaintiff speak [sic] very little English as he is Pilipino [sic] Plaintiff was never given a copy of the loan documents in his native Tagalog . . . nor did anyone ever explain to Plaintiff what he was signing his name to in his native language of Tagalog." Opp. at 14.

II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in a complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-2000 (9th Cir. 2003). Under Federal Rule of Civil Procedure 8(a), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "Detailed factual allegations" are not required, but the Rule does call for sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007)). According to the Supreme Court, "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949-50. In determining facial plausibility, whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

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³ PMH also argues that a Motion to Strike is appropriate under Fed. R. Civ. P. 12(f). See PMH Mot. at 8. That motion is denied.

1 III. DISCUSSION

2 Plaintiff brings four causes of action under federal law, and all have statute of
3 limitations problems. The Court addresses only these causes of actions at this time, as
4 without them, Plaintiff's case is unlikely to remain in federal court. See Acri v. Varian
5 Assocs., Inc., 114 F.3d 999, 1001 (9th Cir. 1997) (quoting Carnegie-Mellon Univ. v. Cohill,
6 484 U.S. 343, 350 n.7 (1988) ("[I]n the usual case in which all federal-law claims are
7 eliminated before trial, the balance of factors . . . will point toward declining to exercise
8 jurisdiction over the remaining state law claims.").

9 The first of the federal claims (Plaintiff's Fifth overall) is a TILA damages claim
10 based on Defendants' failure "to provide Plaintiff with accurate material disclosures . . .
11 [failure to inform him of] "the pros and cons of adjustable rate mortgages in a language . . .
12 that they can understand and comprehend," "[failure to] advise them to compare similar loan
13 products with other lenders," and "[failure to] offer other loan products that might be more
14 advantageous." Cmplt. ¶ 63.

15 TILA provides a one-year statute of limitations "from the date of the occurrence of the
16 violation" for damages claims. 15 U.S.C. § 1640(e). "The occurrence of the violation" is
17 widely understood as the time the loan transaction is consummated. See, e.g., King v State
18 of California, 784 F.2d 910, 915 (1986); Rosal v. First Federal Bank of California, 671 F.
19 Supp. 2d 1111, 1122 (N.D. Cal. 2009). In this case, the loan was consummated on April 27,
20 2006. Cmplt. ¶ 2. The Complaint was filed May 27, 2010. See generally id. Accordingly,
21 the one year limitations period has lapsed. However, equitable tolling of civil damages
22 claims under TILA may suspend the limitations period until the borrower discovers or had a
23 reasonable opportunity to discover the fraud or nondisclosures. See King, 784 F.2d at 915.
24 "Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain
25 vital information bearing on the existence of [his] claim." See Gomez v. Wachovia
26 Mortgage Corp., 2010 WL 291817 at *4 (N.D. Cal. Jan. 19, 2010) (internal quotations
27 omitted).
28

The Complaint alleges in a conclusory manner that equitable tolling should apply. See Cmpl. ¶ 64 (any statute of limitations “were tolled due to Defendants’ failure to effectively provide the required disclosures and notices”). It does not “explain how defendants concealed the true facts or why plaintiff could not otherwise have discovered the TILA violations at the consummation of the loan.” See Keen v. American Home Mortgage Servicing, Inc., 2009 WL 3380454 at *3 (E.D. Cal. Oct. 21, 2009). Indeed, even if the one-year statute of limitation was tolled until Plaintiff’s rate adjusted at the two year mark and he was “hit with extreme ‘payment shock,’” Cmpl. ¶ 2, the Complaint was filed more than two years after that, and would appear to be untimely. Nonetheless, Plaintiff in his Opposition asks the Court to follow Gonzalez v. Ameriquet Mortgage Co., 2004 WL 2472249 (N.D. Cal. March 1, 2004) and toll the statute of limitations, because the loan documents were never provided in Plaintiff’s native language, Tagalog. See Opp. at 18-19. This allegation is nowhere in the Complaint, however.

As the Court informed Plaintiff at the motion hearing, the Court will allow Plaintiff to amend the Complaint to add this allegation if he can do so in good faith. **Plaintiff must amend the complaint by January 7, 2011**, or his case will be dismissed with prejudice. Following amendment, the Court will determine whether Plaintiff exercised due diligence in preserving his claim. See Gomez, 2010 WL 291817 at *4 (finding that even if documents were not translated into Spanish, “Plaintiff did not allege any facts or circumstances that served to prevent her— in the exercise of all due diligence— from having the documents translated into Spanish or having a third party review the documents for her.”).

The second federal cause of action (Plaintiff’s Sixth overall) is a claim under RESPA, “1 U.S.C. § 2601 et seq.”⁴ Plaintiff does not specify which section of RESPA he sues on. The Complaint alleges that defendant Long Beach received hidden and unearned fees “in the form of a Yield Spread Premium,” and that the fees were not reasonable. Cmpl. ¶ 72. The Yield Spread Premium apparently was disclosed to Plaintiff, but as a “credit for closing costs,” which Plaintiff alleges was a “bait and switch tactic.” Id. ¶ 73.

⁴ The proper cite is 12 U.S.C. § 2601 et seq.

1 RESPA causes of action under section 2605 are governed by a three-year statute of
2 limitation. See 12 U.S.C. § 2614; Rosal, 671 F. Supp. 2d at 125. RESPA claims under
3 section 2607 are governed by a one-year statute of limitation. See 12 U.S. C. § 2614. The
4 Ninth Circuit apparently has not addressed whether equitable tolling is available under
5 RESPA, and district courts have reached different conclusions. See, e.g., Brewer v. Indymac
6 Bank, 609 F. Supp. 2d 1104, 1118 (E.D. Cal. 2009); Kay v. Wells Fargo & Co., 247 F.R.D.
7 572, 578 (N.D. Cal. 2007). Regardless, Plaintiff has not even requested equitable tolling on
8 this claim. The Court therefore dismisses the RESPA claim with leave to amend, provided
9 Plaintiff can do so in good faith.

10 The third federal cause of action (Plaintiff's Twelfth overall) is for a Violation of
11 Regulation Z (TILA), as a result of which Plaintiff asserts his right of rescission. Cmpl. ¶
12 102. Plaintiff alleges that he "has not received numerous TIL [sic] initial disclosures, a
13 mandated Mortgage Loan Origination Agreement, California Insurance Disclosure, and
14 Separate Agreements to demonstrate Yield Spread Premiums," and that he "was a victim of
15 additional finance charges and deceptive manipulation in regard to baiting him into this type
16 of loan program." Id. ¶ 103. The fourth federal cause of action (Plaintiff's Thirteenth
17 overall) is essentially identical to the preceding cause of action— it is also for "Rescission"
18 and based on TILA violations. See Cmpl. ¶¶ 106-107.

19 The rescission claims under TILA are untimely. TILA provides a three year statute of
20 limitations "after the date of consummation of the transaction or upon the sale of the
21 property, whichever occurs first," for rescission claims. See 15 U.S.C. § 1635(f). That
22 statute of limitation is absolute; it cannot be tolled. See 15 U.S.C. § 1635(f) ("right of
23 rescission shall expire three years after the date of consummation of the transaction . .
24 .notwithstanding the fact that the information and forms required under this section or any
25 other disclosures required under this part have not been delivered to the obligor"); Walker v.
26 Equiyt 1 Lenders Group, 2009 WL 1364430 at *6 (S.D. Cal. 2009), citing Taylor v. Money
27 Store, 42 Fed. Appx. 932 (1998) ("Equitable tolling does not apply to rescission under this
28 provision of TILA:). Accordingly, the rescission claims are untimely both because they were

1 filed over four years after the transaction was consummated, and because (according to
2 Plaintiff) the property has been sold. See Cmplt. ¶ 153. They are therefore dismissed with
3 prejudice.

4 The Court therefore GRANTS the Motions to Dismiss based on the untimely federal
5 claims, which provide the only basis for the Court's jurisdiction. If Plaintiff can amend in
6 good faith and establish his entitlement to equitable tolling, he must do so **by January 7,**
7 **2011**, or his case will be dismissed with prejudice. Plaintiff is advised that, while he is
8 amending his Complaint, he should also amend his state claims, taking into account the
9 objections Defendants raised in their motions, making certain that he has alleged the relevant
10 elements of each cause of action, specifying the precise laws he alleges have been violated,
11 and only bringing causes of action against the appropriate Defendants.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court GRANTS the Motions to Dismiss, with leave to
14 amend all but the rescission claims.

15 **IT IS SO ORDERED.**

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17 Dated: December 16, 2010



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CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE